STATE OF ILLINOIS
APPELLATE COURT THIRD DISTRICT
OTTAWA

81-139

At a term of the Appellate Court, begun and held at Springfield, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-one, within and for the Third District of Illinois:

Present—

HONORABLE FREDERICK S. GREEN,
Presiding Justice

HONORABLE JAMES T. LONDRIGAN,
Justice

HONORABLE ALBERT G. WEBBER, III,
Justice

JULEANN HORNYAK, Clerk

BE IT REMEMBERED, that afterwards on May 12, 1982 the Order of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

No. 81-139

IN THE

Appellate Court of Illinois

THIRD DISTRICT

FRANK M. WANLESS,
Plaintiff-Appellant,

v.

RHONDA ROTHBALLER and
THE PEORIA JOURNAL STAR, INC.,
Defendants-Appellees.

Appeal from Circuit Court
Peoria County No. 77-L-5147

Honorable Robert E. Hunt,
Judge Presiding.

"Not To Be Published"

RULE 23 ORDER

Plaintiff filed his four-count complaint on December 28, 1977. Counts I and II allege that plaintiff was libeled by defendant Rothballer, a newspaper reporter. Counts III and IV allege that plaintiff was libeled by Rothballer's employer, the Peoria Journal Star. The alleged libelous statements were contained in a series of articles published in the Journal Star in 1977.

Each count of plaintiff's complaint contained an identical paragraph 8. Paragraph 8 included 15 subparagraphs which allege that specific aspects of the statements are libelous. On December 18, 1980, defendants filed a motion for partial

summary judgment as to subparagraphs 8(a), 8(b), 8(e) and 8(k). These particular subparagraphs of plaintiff's complaint are set forth below:

> "(a) that plaintiff had been twice paid for preparing annexation papers—by the Village of Morton and by clients wishing to annex to the Village;
>
> (b) that plaintiff was guilty of conflict of interest in preparing required annexation papers for one Fred Schmidgall ***.
>
> * * *
>
> (e) that it was stated plaintiff had been guilty of a conflict of interest in representing opposite sides in controversies between the Village of Morton and unknown or unnamed parties;
>
> * * *
>
> (k) that the article stated plaintiff was in a conflict of interest in preparing a rezoning ordinance which involved his wife's property."

The trial court granted the motion on January 21, 1981. Plaintiff filed a motion to reconsider, which was denied on February 20, 1981. The trial court's order confirmed the grant of a partial summary judgment and found that there was no just reason to delay the appeal. Plaintiff then orally moved to dismiss the remainder of his complaint without prejudice pursuant to section 52 of the Civil Practice Act (Ill. Rev. Stat. 1979, ch. 110, par. 52). The trial court granted the motion.

The sole issue before this court on appeal is whether the trial court properly granted defendant's motion for summary judgment. Defendants contend that the grant of summary judgment was proper for any of the following three reasons: (1) the statements made were capable of an innocent construction; (2) the statements made were true as a matter of law; and (3) the statements made were not, as a matter of law, made with actual malice.

The innocent construction rule provides that the allegedly defamatory article must be read as a whole and that words are to be given their natural and obvious meanings. The words which are alleged to be libelous must be given an innocent construction where such a construction is possible. Words which can be innocently construed are to be declared nonactionable as a matter of law. *John v. Tribune Company* (1982), 24 Ill. 2d 437, 442, 181 N.E.2d 105, 108.

The statements made in the present case are not capable of innocent construction. Subparagraph (a) clearly states plaintiff was paid twice for doing the same work. There is nothing in the remainder of the article to suggest any other interpretation of this statement.

Subparagraphs (b), (e), and (k) alleged defendant stated plaintiff was guilty of a conflict of interest. Although the articles never state directly that plaintiff was guilty of a conflict of interest, read as a whole they do clearly charge plaintiff with such a conflict. Defendants assert the articles leave it up to the readers to draw their own conclusions. But, given the presentation of facts by defendants, the readers are left with no alternative. It is not necessary to state directly that plaintiff was guilty of a conflict. Imputation is enough. See *Dombrowski v. Shore Galleries, Inc.* (1978), 59 Ill. App. 3d 237, 376 N.E.2d 45; *Spanel v. Pegler* (7th Cir. 1947), 160 F.2d 619.

None of the statements can be said to be true as a matter of law. There is no direct evidence that plaintiff was paid twice for doing the same work. Contrary to defendants' assertion, plaintiff did not state it was his duty to examine and approve all legal documents submitted to the village. Rather, plaintiff stated the board did not ask for his recommendation for approval on annexation papers he prepared. It cannot be said plaintiff was paid under the standing remuneration agreement as if he gave such a recommendation since he stated that if he worked less than 60 hours a month, he credited the village for the difference.

The statements imputing that plaintiff was guilty of a conflict of interest, as alleged in subparagraphs (b), (e), and (k) of paragraph 8 of the complaint, do not support the grant of summary judgment. Although the basic facts do not seem to be in dispute, whether those facts constitute a conflict of interest on plaintiff's part is a question of fact (cf. *Welch v. Chicago Tribune Co.* (1975), 34 Ill. App. 3d 1046, 340 N.E.2d 539.) In *Welch,* the First District found that the issue of whether plaintiff was an alcoholic was an issue of fact that should have been submitted to a jury. The court held this despite the fact that plaintiff admitted consuming 14 to 18 bottles of beer a day. In the case at bar, the question of whether plaintiff was engaged in a conflict of interest was a jury question; summary judgment on that basis was inappropriate.

Plaintiff and defendant agree that plaintiff must show actual malice, as defined in *New York Times v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, on defendants' part in order to recover damages for libel. Actual malice, as defined in *Sullivan,* is "with knowledge that it [the statement] was false or with reckless disregard of whether it was false or not." (376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.) In order to show reckless disregard on the part of defendants, plaintiff must present sufficient evidence for the trier of fact to conclude that defendants "in fact entertained serious doubts as to the truth" of their publication, *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267, 88 S. Ct. 1323, 1325, or had a "high degree of awareness of *** probable falsity." *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 13 L. Ed. 2d 125, 133, 85 S. Ct. 209, 216.

Plaintiff has shown avenues of investigation not pursued by defendants. Plaintiff alleges that the defendants failed to investigate and interview Fred Schmidgall whose annexation case was part of the alleged conflict of interest. Plaintiff also alleges that the defendants failed to check the status of a complaint filed against plaintiff with the Disciplinary Commission relating to these charges, which complaint was known to defendants. These omissions may well be excusable; however, the issue of whether the facts and circumstances of this case disclose a reckless disregard for the truth is not so free from

doubt that an answer can be said to exist as a matter of law. The inaccurate statements made by defendants that plaintiff represented parties before the village board and was paid twice for the same work lend additional support to this conclusion.

We make no decision regarding the ultimate issue of whether plaintiff may recover from defendants. We merely hold that the factual questions heretofore outlined are for the jury to answer. The order granting summary judgment for defendant on subparagraphs (a), (b), (e), and (k) of paragraph 8 of each count of plaintiff's complaint is reversed and the cause is remanded to the circuit court of Peoria County for further proceedings consistent with the views expressed herein.

Reversed and remanded.

Order drafted by LONDRIGAN, J., concurred in by WEBBER, J., and GREEN, P.J., dissenting in part and concurring in part.

STATE OF ILLINOIS,
APPELLATE COURT, ss.
THIRD DISTRICT,

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and eighty-two.

/s/ JOSEPH FORMERLEY
Clerk of the Appellate Court

Mr. PRESIDING JUSTICE GREEN, dissenting in part and concurring in part:

I deem the information properly before the trial court to have shown, as a matter of law, that defendants did not act with malice in making the statements imputing to plaintiff a conflict of interest as alleged in subparagraphs (b), (e), and (k). No evidence indicated the statements were known by defendants to be false. Defendant Rothballer was shown to have made an extensive investigation of the question of whether plaintiff's activities created a conflict of interest. Evidence that she failed to make inquiry of the Disciplinary Commission or of Fred Schmidgall falls far short of establishing any basis for a factual determination that she acted with reckless disregard for the truth. The summary judgment for defendants should be affirmed in respect to the allegations of those subparagraphs.

For the reasons stated by the majority, I agree that the summary judgment should be reversed as to the allegations of subparagraph (a).

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 5, 1982

Mr. Ross E. Morris
Attorney at Law
225 W. Lincoln
P.O. Box 151
Lewistown, IL 61542

No. 57107— Frank M. Wanless, respondent, vs. Rhonda Rothballer, et al., etc., petitioners. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ JULEANN HORNYAK
Clerk of the Supreme Court

Annexing To Morton . . . Village Atty. Wanless Paid By Private Clients, Taxpayer

By Rhonda Rothballer

MORTON—Village Atty. Frank M. Wanless has been paid twice for preparing annexation papers—by the village and by clients wishing to annex to the village.

He has presented annexation petitions for his clients while acting as the board attorney.

A public official has a conflict of interest when he could personally benefit financially be a governmental action, which he could directly or indirectly influence.

Former Tazewell County State's Atty. C. Brett Bode said he repeatedly told Wanless to stop this practice, but the policy went unchanged. Last February the Village Board reaffirmed the village's annexation procedure, permitting Wanless' dual representation.

At Monday's Village Board meeting, Wanless said he has stopped representing both sides in annexation cases. He said he never thought there was a conflict of interest in the board's policy.

Because of the controversy, however, he said he decided not to represent individuals wishing to annex to the village.

He made this decision "at least six months ago," but decided to announce it publicly Monday.

Six months ago would have been last July, when he represented Fred Schmidgall who wished to annex to the village. Schmidgall lives on N. Morton Ave., and his annexation fee was established by the village.

Six months ago would have also been five months after the controversy was quieted by the board's reapproval of the annexation procedure.

During the interim from July to Janaury, there has been only one annexation request. That was from Schrock Builders in October, and the firm's attorney represented the company in its petition.

Wanless hasn't represented any individuals petitioning for annexation during the past five months. But there haven't been any such requests before the board.

Wanless' dual involvement was questioned last July by Trustee Ruth Ferguson. He replied that he was a private lawyer as well as the village attorney.

"I have to make a living too," he said.

The village ordinance still permits the policy of the village attorney representing both sides during annexation cases.

Mayor Eugene Mathis supported the practice in September. And Wanless said he supported the policy when questioned, about it Oct. 29.

Mayor Eugene Mathis said Wanless prepares annexation papers when the matter "is all cut and dried and the board has set up annexation fees in certain areas." For example, anyone living along N. Morton Ave. could annex to the village for a $1,200 fee.

"Frank (Wanless) will prepare the annexation papers for these people," Mathis said. Those individuals will also pay Wanless for his services. He determines the fee, which is usually about $80.

In cases where persons petition the board for annexation and a fee has yet to be set, Wanless will not represent the individuals, Mathis said.

"When all the rules of annexation are laid down," Wanless said he does the legal work: "We have a policy, for the most part, that the village annexes property only contiguous to the village with the terms the board sets down by ordinance.

"I've always declined when a matter wasn't set ... But, otherwise, oh, why not? If they want me to prepare it, I would do it," Wanless said.

Former State's Atty. Bode said he didn't take any action against Wanless because he didn't consider his dual legal service a criminal act.

"It is legally, ethically improper to represent both sides of any controversy or contract, especially by a public attorney, employed by the public, the taxpayers," he said.

"It's a simple conflict. The simple man on the street can see that." Bode said even when there is only an appearance of impropriety, the action should be avoided.

"I've made no secret of it. Some of the transactions at least had the appearance of impropriety. I, personally, think he should avoid such a thing," Bode said.

He requested a formal opinion from Illinois Atty. Gen. William J. Scott about this annexation method. But, before it was finished, Bode left his office to new State's Atty. Bruce Black.

Black must now decide if he wants the opinion completed and released.

Besides the ethical reasons, Bode said Wanless could misuse his authority.

Charges alleging conflicts of interest and other related practices have been swirling about the Morton Village Board recently. This is the last of a series of articles looking into the allegation in some detail.

"He could harass someone who wants to do something. He can bog them down in red tape. Someone else, one of the 'in crowd,' could get by without requiring all sorts of things of him. In local government, favoritism runs rampant," Bode said.

Because Wanless knows all the village laws and codes, any other attorney would take more time checking the necessary information to prepare an annexation petition, Mathis said.

Disputing Mathis' reasoning, Wanless said it's easy for attorneys to prepare annexation papers.

"I've prepared papers for other communities. You just check the pecularities of the codes, It's not a major task; most any attorney can do it," he said.

Tazewell County State's Atty. Black said he considers it unethical to represent both sides in any legal matter. Using a divorce analogy, he said he would not represent both persons even in an uncontested divorce.

"A lawyer shall not accept private employment in a matter in which he had (has) substantial responsibility while he was

(is) a public employee," according to Canon 9 of the Code of Professional Responsibility and the Professional Ethics Opinions of the Illinois State Bar Association.

Wanless is considered a public official while representing the village and annexation involves the village's legal rights and obligations.

OTHER professional ethics opinions reiterate Canon 9. ISBA Opinion 289 cites Canon 49 which "prohibits the lawyer in public employment, among other things, from accepting representation of a person or corporation who seeks favorable consideration on any matter pending before the public body by which he is employed."

Wanless doesn't view his action as a conflict of interest. His definition of a conflict of interest is any proposal that "wasn't in harmony with what the village wanted to be done." As long as plans correspond with the village's best interest, then there could be no conflict, he said.

By that interpretation, he would view the annexation of certain properties as a desirable thing. Therefore, he wouldn't consider himself in conflict.

However, his definition is contrary to all known principles of law, according to Ludwig Kolman of the Better Government Association legal staff in Chicago.

Trustee Ruth Ferguson, who is an announced candidate for mayor, researched the village's annexation procedure and claimed it was a financial hardship to potential residents and caused a conflict of interest for Wanless.

She recommended last Feb. 2 that the village attorney continue to prepare annexation petitions, but at no cost to the annexing party. The homeowner annexing would still pay annexing fees to the village, but not to Wanless.

Those annexing would also pay for the required certified plat, as they do now, according to her proposal.

When persons ask Washington Atty. Kenneth Black to represent them in annexation proceedings, he usually tells them to hire another attorney.

If the offer is too lucrative to pass up, he could ask the City Council to temporarily use another attorney so he can represent the individuals. As a result, he doesn't represent both the city and the annexing petitioners.

MANY CITIES pay the attorneys' fees connected with annexation because of the anticipated tax revenue from the additional residents.

"The village board policy of permitting the village attorney to prepare the necessary papers to annexation at the expense of the property owners saves the taxpayers the expense," Wanless recently wrote in the local Morton paper.

"The annexation charge long ago established by the village board is a unique attempt to equalize the cost of water and sewer department between Morton taxpayers who are continually paying the annexing property owner who gets the immediate benefit of the system," Wanless wrote.

At the board meeting after Mrs. Ferguson's proposal, Trustee Lee Hinnen proposed that no changes be made in the village's annexation procedure.

Trustee Lloyd C. "Bud" Zobrist seconded the motion, and the board reaffirmed the village's annexation procedure. Only Trustee Ferguson voted against it.

Trustee Jack Taylor, who had supported Mrs. Ferguson's proposal was absent from that meeting.

After that, the very next motion was a petition to annex a portion of Waldheim subdivision to the village. It is one of Zobrist's development.

Zobrist abstained from the vote as the board approved the request.

At a public hearing in August 1975 for a special assessment sewer project on N. Morton Ave., where Waldheim is located Wanless said he was the attorney for the subdivision's development company known as WRCL Co.

So, he was representing Trustee Zobrist in his annexation request, as well as representing the village. He also was

preparing the special assessment project that would affect his client Zobrist, and future subdivision dwellers.

When the project was presented, Trustee Ferguson and Taylor voted against it because they claimed the Waldheim subdivision was receiving preferential treatment.

Other subdivision developers had to pay to bring their pipeline to the village's trunk line, Solly E. Ackerman, developer of Hyde Park Subdivision north of Waldheim, bore that expense himself.

With this plan, $20,000 in village tax fund were used to bring the auxiliary trunk line directly to the Waldheim subdivision. There was a cost to developer Zobrist, also a village trustee.

Once that line was furnished, the individual lots were assessed for the remainder of the sewer project costs. The entire sewer system forming the subdivision was provided without any cost to WRCL Co.

Additionally, the engineering firm for the subdivision, sewer assessment project and village was Kingdon & Naven.

Zobrist's relationship with Wanless can be noted as far back as 1959, when Wanless was the registered agent for the Country Aire Club Zobrist and four other members of his family were listed as directors of the not-for-profit private recreational center.

Wanless was also the registered agent in for the Field Corp., which directs a Shopping Center, another Zobrist developement.

Wife's Land Value Benefits From Wanless-Prepared Rezoning Law

MORTON—A rezoning ordinance prepared by Village Atty. Frank M. Wanless in 1972 multiplied the value of 35 acres of land belonging to his wife.

The land, adjacent to Grundy School here, is being purchased by Louise Wanless on a contract for deed basis.

She agreed to buy the land, then zoned single-family residential on Oct. 20, 1972. A public hearing to "update the village map" was conducted on Nov. 27, 1972, on changing her land to multiple-family residential.

The Village Board approved this change, along with 13 other rezoning classifications on Dec. 4, 1972.

Ray Litwiller, of Columbia, Mo., who still holds the deed for the Wanless property, said he knew the land was to be rezoned when he sold it to Mrs. Wanless. He would not discuss the transaction further.

With little discussion at the public hearing, the Planning Commission recommended the 14 parcels of land included in the ordinance be rezoned.

Some zoning classifications were new and others were aligned to comply with rezoning already approved by the board since the publication of previous zoning maps.

Former Tazewell County State's Atty. C. Brett Bode investigated the ordinance and said he could not find "any criminal violation."

"It is legally, ethically improper to represent both sides of any controversy or contract, especially by a public attorney, employed by the public, the taxpayers," he said.

Bode told Wanless to stop representing both the village and clients in the same governmental matter. This is especially so when his wife is involved, Bode said.

Defending his preparation of the ordinance, Wanless wrote: "Mrs. Wanless is her own free agent.

"She certainly has as much right as anyone, . . . to buy and own property in Morton. In fact she does and has for many years owned property in her own name.

"Because I was attorney for the village, she should have been neither favored nor penalized. She had contractural interest in the land, not I," Wanless wrote.

To be certain his wife wouldn't be "favored nor penalized" by his position, Wanless could have asked that another attorney prepare the ordinance.

"Was this (the rezoning) in the best interest of the taxpayers of Morton or the best interest of Mr. Frank Wanless?" Trustee Ruth Ferguson asked at a public meeting.

Canon 5 of the Illinois Code of Professional Responsibility states that a lawyer's professional judgment should be exercised "free of compromising influences and loyalties."

Lawyers who serve as public officials "should not engage in activities in which his personal or professional interests are or . . . may be in conflict with his official duties," according to Canon 8 of the Code.

Other parcels of land rezoned with the passage of the ordinance include two tracts owned by William Roecker, secretary of the Planning Commission.

Former Village Board members William M. Miller and Ervin Kahler also had land reclassified with the board action. Two parcels are listed with "owners unknown" in the Tazewell County Recorder of Deeds Office.

Usually rezoning petitions are presented by the individuals requesting the change. They submit a legal description of the property to be rezoned and pay a $75 fee.

This is a common procedure followed in surrounding communities, although the fee may vary.

THERE WAS no such rezoning petition, legal description or fee paid for reclassifying the Wanless property, or other parcels rezoned with it.

That is because the village initiated the change, not at the request of Mrs. Wanless or anyone else, Bode said. Municipalities can and do rezone property to adhere to the community's comprehensive master plan.

There is no record as to who proposed this change and to what plan it had to conform.

Apartments could be built on the Wanless tract, but there has been no development there in four years.

Village trustees here have rezoned privately owned property in the past without a direct notice to the owner, such as a registered letter.

Publishing legal notices on public hearings about proposed rezonings satisfies the law, Bode said.

During the public hearing on Nov. 25, 1972, no names of property owners were given and only three common addresses were given. The other 11 parcels were described with legal terms.

No adjacent property owners were notified of the proposal to rezone property.

In Washington, names of property owners requesting rezoning and common addresses of such properties are published in the newspaper legal notice.

Property owners in Peoria living within 300 feet of property to be rezoned are notified of these requests before public hearings.